UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM A. BOWEN, Appellant, v. DEPARTMENT OF JUSTICE, Agency.	DOCKET NUMBER SF07528710844 DATE: SEP 30 1988

Timothy Still, American Federation of Government Employees, El Centro, California, for the appellant.

Martin Soblick, Esquire, San Diego, California, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant petitioned for review of the initial decision issued on November 23, 1987, that sustained his removal for excessive unauthorized absence. For the reasons set forth below, the Board DENIES the petition for failure to meet the criteria for review under 5 C.F.R. § 1201.115. The Board REOPENS this case on its own motion under 5 C.F.R. § 1201.117, however, and AFFIRMS the initial decision as MODIFIED in this Opinion and Order.

BACKGROUND

The facts in this case are undisputed. Shortly after the appellant, a Border Patrol Agent, was indicted on April 30, 1986, on criminal charges related directly to his law enforcement duties, he was detailed to a position in the Electronics Shop to perform non-law enforcement duties. In April and May 1987, the appellant advised the agency that he was dissatisfied with his detail and indicated that the loss of overtime pay was creating a financial burden. He also advised the agency that his wife had obtained a well-paying job in a different city and would be moving there. From April 27, 1987, until his removal was proposed on June 19, 1987, the appellant failed to report for work. His removal for excessive unauthorized absence followed.

The administrative judge found that the charge was sustained, that the appellant should have grieved the reassignment if he thought that it was improper, and that he did not have the right to refuse to come to work because he felt that his reassignment was improper.[1] The administrative judge also found that removal promoted the efficiency of the service and was reasonable for the sustained misconduct.

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[1]We note, in this regard, that where an agency indefinitely suspends an employee pending the outcome of a criminal charge, it must prove that a lesser penalty would have been ineffective. *Martin v. Department of the Treasury*, 12 M.S.P.R. 12, 19 (1982).

ANALYSIS

In the petition for review, the appellant argued that the administrative judge incorrectly stated that the appellant had been reassigned, when in fact he had only been detailed to perform non-law enforcement duties. Although the initial decision does refer to the appellant's "reassignment," the administrative judge's analysis is equally applicable to details. The Board does not have jurisdiction to review an agency's decision to detail an employee to another position where there is no reduction in pay. *See Chleapas v. Department of Health, Education and Welfare*, 1 M.S.P.R. 479, 481 (1980). Further, the appellant cannot refuse to come to work if he feels that his detail to another position is improper. If the appellant wanted to challenge the propriety of his detail, he should have filed a grievance with the agency.[2] *See Bigelow v. Department of*

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[2]In the petition for review, the appellant argued that the administrative judge disregarded the collective bargaining agreement. Under Article 26, section C, of the agreement, an employee cannot be detailed away from his duty station for more than 35 days without permission. *See* Hearing Tape 1, Sides A and B. This provision, he argued, allowed him to terminate his detail because it exceeded 35 days and he informed the agency that he did not want to continue it. Article 32, however, provides for the filing of grievances where the employee disagrees with an agency order or policy.

Health and Human Services, 750 F.2d 962, 965 (Fed. Cir. 1984).[3] He did not do so.

The appellant also argued that the administrative judge erred in denying his motion for sanctions against the agency for the untimely filing of its exhibits. We find no error in the administrative judge's denial of the motion for sanctions during the hearing because the appellant had not shown that he was prejudiced.[4] *See Logan v. Department of the Navy, Military Sealift Command, Atlantic*, 29 M.S.P.R. 573, 577-78 (1986) (sanctions may be imposed by the administrative judge only when necessary to serve the ends of justice and only when a party has failed to exercise basic due diligence expected of it in complying with any order, or when a party has exhibited negligence or bad faith in its efforts to comply), *aff'd*, 809 F.2d 789 (Fed. Cir. 1986); *Rana v. Department of Defense*, 27 M.S.P.R. 678, 679

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[3]*Cf. Gragg v. United States Air Force*, 13 M.S.P.R. 296, 299 (1982) (an employee does not have the unfettered right to disregard an order merely because there is substantial reason to believe that the order is not proper; he must first comply with the order and then register his complaint or grievance, except in certain limited circumstances where obedience would place the employee in a clearly dangerous situation), *appeal dismissed sub nom. Gragg v. United States*, 717 F.2d 1343 (Fed. Cir. 1983).

[4]The appellant argued that he was harmed because the agency did not supply the union with the information it requested and later used that information at the hearing. The appellant did not request additional time to prepare for the hearing when he received the agency's exhibits on September 4, 1987, but instead waited until the hearing on September 9, 1987, to move for sanctions. Moreover, the administrative judge noted at the hearing that the appellant was probably familiar with most of the exhibits submitted by the agency and that some of them had already been submitted by the appellant. *See* Hearing Tape 1, Side A.

(1985) (imposition of sanctions is a matter committed to the administrative judge's discretion). Further, the record shows that the administrative judge conducted two prehearing conferences and specifically instructed the agency representative to wait until after the second prehearing conference to file the witness list and exhibits. *See* Hearing Tape 1, Side A. The appellant had not objected to that procedure.

The appellant argued that the administrative judge failed to consider whether the agency erred in taking his identification card away before he was detailed to the Electronics Shop. The propriety of agency's decision to take away the appellant's identification card is irrelevant to the removal action. The administrative judge's failure to address this point, therefore, is not error. *See* 5 C.F.R. § 1201.111(b)(1).

The appellant also argued that the administrative judge erred in issuing the initial decision approximately 60 days after the hearing because he stated that he would issue the initial decision within 20 days after the hearing. The decision was issued less than 4 months after the appeal was filed, and the appellant has not shown how he was harmed by this timing. *See Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981) (the administrative judge's procedural error is of no legal consequence unless it is shown that it has adversely affected a party's substantive rights).

The appellant also argued that the administrative judge showed prejudice against him and his representative during the hearing. In making a claim of bias or prejudice against an administrative judge, a party must overcome the presumption of honesty and integrity that accompanies administrative adjudicators. *Oliver v. Department of Transportation*, 1 M.S.P.R. 382, 386 (1980). The administrative judge's ruling against the appellant on his motions during the hearing does not overcome that presumption.

This is the Board's final order in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you

personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.